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January 14, 2005

Ms. Marlene H. Dortch  
Federal Communications Commission  
Office of the Secretary  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20445

**Re: *Ex Parte* Submission in CS Docket No. 98-120 and MB Docket No. 03-15**

Dear Ms. Dortch:

EchoStar Satellite L.L.C. (“EchoStar”) writes to supplement the record in the above-referenced proceedings. In short, EchoStar supports the concept, advanced by the Media Bureau, of including all satellite households that receive local broadcast stations towards satisfying the statutory threshold of 85% digital penetration, which will in turn mark the completion of the digital television (“DTV”) transition.<sup>1</sup> EchoStar notes that this statutory interpretation stratagem has been largely necessitated by broadcaster delays, which have resulted in a DTV penetration rate (narrowly construed) that is still far lower than the 85% target.<sup>2</sup> Regardless of the problem’s roots, however, something has to be done to solve it, and EchoStar believes that counting satellite households toward the threshold could help accelerate the transition.

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<sup>1</sup> *Completing the Digital Television Transition*, Hearing Before the Senate Comm. on Commerce, Sci. & Transp., 108th Cong. (2004) (statement of Kenneth Ferree, Chief, Media Bureau, Federal Communications Commission) (“*Ferree Testimony*”) (“All satellite households in local-into-local markets that receive the local broadcast package, and all satellite households with HDTV service, will count towards the 85 percent threshold in those markets.”).

<sup>2</sup> The penetration threshold is set forth in 47 U.S.C. § 309(j)(14)(B).

EchoStar supports the concept subject to two important conditions. First, as the draft Bureau plan submitted to Congress contemplates,<sup>3</sup> satellite MVPDs should be allowed to down-convert local digital stations for the purpose of complying with their carriage obligations after completion of the transition.<sup>4</sup> Second, EchoStar strongly opposes any multi-cast carriage obligations. There is no evidence at all, in this or any other proceeding, that carriage of a broadcaster's second, third, or sixth feed will threaten that broadcaster's viability.

I. High Definition Must-Carry Is Unconstitutional and Inappropriate

HDTV and multicast must-carry remain a prohibitive proposition today for satellite operators and will likely still be prohibitive at the time contemplated for completing the transition—January 1, 2009. Even if it were feasible, such obligations would impose a burden that would be both unconstitutional as a matter of law and inappropriate as a matter of policy. Among other things, HD must-carry would require dual carriage of HDTV and down-converted feeds for an indeterminate period of time, to avoid disenfranchisement of subscribers without HD

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<sup>3</sup> See *Ferree Testimony* (“[S]atellite operators in local-into-local markets would be required either: (a) to carry one standard-definition digital programming stream from each broadcaster in the market (down-converted from HDTV to standard-definition, if necessary); or (b) to pass through the digital broadcast signals to subscribers’ homes, where all subscribers have the ability to receive and display the programming.”).

<sup>4</sup> EchoStar also responds to submissions made by the National Association of Broadcasters (“NAB”), the Association of Public Television Stations (“APTS”), and the DIRECTV Group, Inc. (“DIRECTV”) regarding this issue. Letter from Edward O. Fritts, National Association of Broadcasters, et. al., to Marlene Dortch, FCC, re CS Docket No. 98-120, MB Docket 03-15, Oct. 29, 2004. (“*NAB Submission*”); Letter from Lonna N. Thompson, Association of Public Television Stations, to Michael K. Powell, FCC, re *Ex Parte* submission, CS Docket Nos. 98-120, 00-96; CSR-5865-Z, Oct. 29, 2004. (“*APTS Submission*”); Letter from William M. Wiltshire, Counsel for DIRECTV Group, Inc., to Marlene H. Dortch, FCC, re *Ex Parte* Notification, CS Docket No. 98-120 (also CS Docket Nos. 00-96, and 00-2), Oct. 12, 2004. (“*DIRECTV Submission*”).

receivers.<sup>5</sup> As the FCC has already ruled tentatively in connection with cable must-carry, dual carriage is unconstitutional.<sup>6</sup>

The alternative advanced by the NAB of installing a down converter at these subscribers' homes is utopian.<sup>7</sup> Currently, a set-top box capable of down-converting an HD signal is not commercially available (except as a feature on a more expensive device that also has an HD output in addition to the down-converting function).<sup>8</sup> Even assuming that the cost for a stripped-down device for a satellite feed would be comparable to that of a similar over-the-air

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<sup>5</sup> If, as stated in the Ferree plan, the DTV transition is deemed complete because satellite households receiving local-into-local service are counted among the 85% of viewers, *Ferree Testimony* at ¶ III.4, then many EchoStar subscribers with only analog television sets would have no capability of viewing anything other than a down-converted signal. Thus, in order to provide service to all of its subscribers and comply with an HD must-carry requirement, satellite providers would be obligated to carry both an HD and a down-converted or SD feed. Even if recipients of MVPD down-converted signals were not counted towards the 85% penetration rate, then at least 15% of EchoStar subscribers would be similarly disenfranchised without a down-converted signal after the transition is completed.

<sup>6</sup> The Commission recognized that “a dual carriage requirement appears to burden cable operators’ First Amendment interests substantially more than is necessary to further the government’s substantial interests.” See *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 2598, 2600 ¶ 3 (2001). Bureau Chief Ferree reconfirmed this view in his June testimony before the Senate Commerce, Science and Transportation Committee. *Ferree Testimony* (“In 2001, the Commission tentatively concluded that [ ] a [dual-carriage] requirement would be an unconstitutional abridgement of cable operators’ First Amendment rights. Based on the evidence submitted in the must-carry docket, the Bureau is convinced that the Commission’s tentative conclusion was correct. In constitutional parlance, a dual carriage requirement clearly imposes a greater burden than necessary to further any discernible government interest at stake. Indeed, I am concerned that the imposition of a dual carriage requirement would, in the inevitable judicial review that would follow, place the whole must-carry regime at risk.”).

<sup>7</sup> See *Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc.*, MB Docket No. 04-210, at 2 (Aug. 11, 2004) (“*NAB Comments in MB Docket No. 04-210*”).

<sup>8</sup> See *NAB Comments in MB Docket No. 04-210* at 13 (“Current DTV converters are available from about \$300 and up, although none are presently available with SD-only outputs.”).

device, estimates put the initial costs at hundreds of dollars.<sup>9</sup> The expectation cited by some parties that costs will go down with greater demand may prove true but is still speculative.<sup>10</sup> In any event, even if the most optimistic cost projections were realized, the proposal would likely entail an expenditure of hundreds of millions of dollars for subscribers of a multichannel video programming distributor (“MVPD”) such as EchoStar alone. This expense would have to be incurred for a transitional device that would be destined to become obsolete as consumers ultimately acquire DTV receivers. Satellite MVPDs would therefore have to absorb the cost. They cannot be constitutionally required to do so. Even setting aside the constitutional problem, the Commission does not have statutory authority to require satellite operators to install such down-converters at subscribers’ homes.

Nor would such requirements (either dual must-carry or the installation of down-converters at subscribers’ homes) be sound as a matter of policy. They would be a huge subsidy to the broadcast industry, which has reneged on its 1997 bargain with Congress, and now wants MVPDs to finance a delivery system that would substitute for the build-out obligations that the broadcasters undertook then. The accolades that the NAB continues to heap on its members regarding DTV progress are belied by data recently released by the Commission, revealing that some **60%** of operating commercial DTV stations are on the air with less than full power

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<sup>9</sup> See *Comments of the Association of Public Television Stations*, MB Docket No. 04-210, at 17 (Aug. 11, 2004) (“At present in the United States, set-top converter boxes cost anywhere from \$300 to \$400...”).

<sup>10</sup> See, e.g., *NAB Comments in MB Docket 04-210* at 14 (“The Arthur D. Little study noted that by the year 2006 digital converter boxes could be expected to sell at retail for under \$200, with a manufacturing cost near \$100...”); Staffer Says Hill to Act on DTV Transition, Converter Subsidies, 25 *Communications Daily* 6, at 1 (Jan. 10, 2005) (“DTV-to-NTSC converters will be “very low cost” even before the final DTV conversion, said John Taylor, VP-public affairs for LG Electronics/Zenith. Depending on the volume, he said, the cost could reach \$50 per box by 2006 or 2007.”).

facilities.<sup>11</sup> The imposition of HDTV must-carry on MVPDs would virtually ensure that broadcasters with temporary low power authority would never fully build out their high-power facilities, since the threatened loss of interference protection for unreplicated contours would be virtually meaningless with the guarantee of satellite and cable HDTV must-carry to fall back on.

Even setting aside the dual carriage aspect (or the alternative of down-converter installation), HDTV must-carry would be extraordinarily burdensome in light of the spectrum constraints hampering satellite service. Satellite retransmission of an HDTV channel requires at least twice the spectrum needed for an analog feed. Because the use of bandwidth by a satellite carrier in one city prevents use of the same bandwidth for a much broader geographical region (even with spot beam technology), HDTV carriage in one market has a significant ripple effect on the already limited spectrum available to DBS operators. For that reason, absent a significant increase in satellite resources and available spectrum, HDTV must-carry would require either a dramatic decrease in the number of markets to which a satellite carrier would be able to provide local stations, or a displacement of other programming.

While the burden from HDTV must-carry is significantly greater than carriage of an analog feed or its down-converted equivalent, the governmental interest in expanding carriage obligations is dramatically less compelling, if it exists at all. In *Turner Broadcasting System, Inc. v. FCC*, the Court found that without the must-carry obligation “significant numbers of

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<sup>11</sup> *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, FCC 04-192 (rel. Sept. 7, 2004), ¶ 81 (“[a]pproximately 45 percent of [commercial and non-commercial] broadcasters currently on the air have built licensed facilities and are operating at full power”) and Appendix D (in which the FCC reports that the figure for **commercial** broadcast stations is even lower – of 1137 commercial stations on the air, only 452, or slightly less than 40%, are operating their fully licensed facilities).

<sup>13</sup> 512 U.S. 622, 666 (1994).

broadcast stations will be refused carriage on cable systems; and ... the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether.”<sup>13</sup> Even if failure of a satellite distributor to carry a local station altogether could be said to threaten somehow that broadcaster’s viability, no such threat is discernible from carriage of that station’s down-converted feed (as opposed to the full-fledged HDTV feed). HDTV must carry would thus promote a totally elusive government goal at the expense of a huge increase in the burden imposed on the distributor.

## II. Multi-Cast Carriage Also Fails Under *Turner Broadcasting v. FCC*

For similar reasons, a digital multi-cast obligation would be unconstitutional. The multi-cast obligation would further no legitimate governmental interest to the degree found necessary in *Turner*. Again, even accepting the premise that non-carriage of a broadcaster’s main feed threatens that broadcaster’s viability, there is absolutely no evidence to suggest that, without the right to demand carriage of a second, third or sixth channel, broadcasters will either deteriorate to a substantial degree or fail. As the court explained in *Turner*, the validity of the infringement on EchoStar’s First Amendment rights is dependent on proof that “the must-carry rules are necessary to protect the viability of broadcast television....”<sup>14</sup> No evidence of such a threat is discernible here. The multi-cast obligation is an unadorned handout to broadcasters, at the expense of DBS operators’ First Amendment rights.

## III. DIRECTV’S Announcement Is Misleading

Additionally, neither the Commission nor Congress should take action in this area based on the recent announcements made by DIRECTV regarding its plans to carry as many as

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<sup>14</sup> *Id.*

1,500 local HD channels by means of its Ka-band Spaceway satellites over a period of three years.<sup>15</sup> The Commission should be skeptical for several reasons.

First, DIRECTV's recent FCC filing in this proceeding signals a retreat from its September 8, 2004 news release.<sup>18</sup> DIRECTV now explains that the feasibility of adding 1,500 HD local channels by 2007 depends on its ability to manipulate these feeds with modulation and compression techniques. While DIRECTV is of course correct that better modulation and compression are essential to spectrum efficiency, it is not clear what DIRECTV means, and how its concept of compression, for example, differs from down-converting or down-rezzing the signal.

Second, DIRECTV's plan relies for the most part on the use of Ka-band satellites. As the Commission is aware, this band presents significant propagation difficulties, not the least of which is severe rain attenuation in large regions of the country, and remains relatively untested for Direct-to-Home video delivery. EchoStar is intimately familiar with these

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<sup>15</sup> See *DirecTV Submission* at presentation page 3 ("DIRECTV has announced plans to construct and launch next-generation satellites over the next three years to enhance the consumer experience by increasing capacity for HD carriage - 2005: two satellites, ~500 local HD channels - 2007: two satellites, ~1000 local HD channels plus ~ 150 national HD channels.").

<sup>18</sup> *DIRECTV Announces Plan to Launch Next Generation Satellites to Provide Dramatic Expansion of High-Definition and Advanced Programming Services*, News Release, Sept. 8, 2004, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=617918&highlight=> .

difficulties, as it has launched the first (and to date, only) commercial Ka-band payload. In order for satellite providers to effectively utilize the Ka-band, they first must overcome the increased signal attenuation by increasing power and bandwidth. Additionally, since portions of the Ka-band are also used by terrestrial microwave services on a primary basis, they probably cannot be used for direct-to-home video service at all and are only suitable for feeder link applications. It is not clear that DIRECTV's plan fully takes into account these constraints of the Ka-band spectrum.

Third, DIRECTV's plans are derivative of its abandonment of its SPACEWAY broadband service offering, which left DIRECTV with excess satellite capacity and the incentive to minimize its financial loss. Neither the Commission nor Congress should consider making policy for all satellite operators based on the serendipitous event that one operator built satellites worth billions of dollars only to find that the business plan for which the satellites had been built was not viable, making them available for another use.

In addition, EchoStar notes that the entity controlling DIRECTV has a much greater interest in maximizing carriage of its parent's broadcast network and FOX affiliated stations than in taking account of the concerns of a satellite distributor. The News Corporation has a majority interest (controlling 97% of the voting interest and approximately 82.1% of the equity interest) in the Fox Network and stations, but only a minority interest (approximately 34%) in DIRECTV.<sup>19</sup> In fact, the News Corporation recently announced its intention to buy

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<sup>19</sup> See *News Corporation Announces Exchange Offer For Publicly Held Fox Entertainment Group Common Stock*, Press Release, Jan. 10, 2005 (available at [http://www.newscorp.com/news/news\\_237.html](http://www.newscorp.com/news/news_237.html)) ("News Corp. Press Release"). See *In the Matter of General Motors Corp. and Hughes Electronics Corp., Transferors and the News Corp. Ltd., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, FCC 03-330, ¶ 1, 7 (2004).



back the remaining interest in Fox so that it would own and control the station at 100%.<sup>20</sup> Thus, a must-carry requirement that benefits broadcasters and harms satellite distributors in equal measures would mean about three times more benefit than harm for News Corp. News Corp.'s predominant interest is to maximize MVPD carriage for its broadcast operations.

More generally, HDTV must-carry would fetter satellite operators in their efforts to compete with digital cable by matching the pay-per-view and video on demand options and interactive services that digital cable systems can, and increasingly do. Indeed, DIRECTV is correct that cable HDTV must-carry effectively *decreases* the spectrum that cable systems will allocate to local station carriage, and it has the reverse effect on satellite operators, further exacerbating the difference in bandwidth between the two modes of delivery.<sup>21</sup>

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<sup>20</sup> *News Corp. Press Release* ("News Corporation today announced that it has made a proposal to its subsidiary Fox Entertainment Group, Inc. ("Fox") to acquire all of the shares of Fox Class A common stock that News Corporation does not already own.").

<sup>21</sup> See *DirecTV Submission* at presentation page 4-5 ("Each cable system retransmits only the stations in its area. Cable operators retransmit local channels primarily in analog format without compression – 6 MHz over-the-air analog signal takes 6 MHz on analog cable system. With digital modulation (but not compression), cable operators can retransmit HD over-the-air signal using only 3-4 MHz on a typical digital cable system. Thus, digital conversion *saves* one-third to one-half the capacity currently required for retransmission of local stations. DBS carriage of local signals is very different from cable. DIRECTV must retransmit all broadcast signals in each of the markets served nationwide from a very limited number of orbital locations – currently 890 stations from two orbital locations. DBS operators convert analog signals to standard definition ("SD") digital format. DBS operators already use digital modulation and compression for both SD and HD transmissions. Single DBS transponder currently carries 11 to 12 SD broadcast signals. Single DBS transponder currently carries only 2 HD signals. Thus, conversion to HD currently requires DBS operators to use *six times* as much capacity for local broadcast carriage. Existing spot beams are fixed and do not have sufficient capacity to satisfy HD "carry one, carry all" requirement.").

#### IV. EchoStar Remains Spectrum-Constrained

Nor is APTS correct that EchoStar's new extended Ku-band licenses will supply the bandwidth required for complete HD local carriage.<sup>22</sup> This is not "clean" spectrum: portions of the extended Ku-band are allocated on a co-primary basis to the terrestrial wireless fixed-service ("FS") operations in addition to the Fixed-Satellite Service. The spectrum is currently being used for terrestrial microwave services in many areas. The spectrum is also used by the U.S. government for radiolocation and space research services, further constraining its utility.<sup>23</sup> To ease coordination burdens on the co-primary FS operators, Commission rules impose limitations on the use of ubiquitously deployed earth stations in the downlink extended Ku-band. To obtain waivers of these limitations, EchoStar has had to subject itself to onerous conditions, including the acceptance of "any level of interference from FS stations" into EchoStar's receive-only earth stations in the band.<sup>24</sup>

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<sup>22</sup> EchoStar has two extended Ku-band satellite authorizations: SAT-LOA-20031211-00350, assigned to EchoStar Satellite LLC by SAT-ASG-2004-1014-0200; and SAT-LOA-20031215-00355. EchoStar has surrendered one of the three licenses it originally received; the extended Ku-band makes sense only as an addition to a hybrid satellite, and the 83° W.L. slot is problematic in the Ka-band because of the proximity of a Canadian satellite.

<sup>23</sup> See *In the Matter of EchoStar Satellite LLC, Application for Authority to Construct, Launch and Operate a Geostationary Satellite Using the Extended Ku-band Frequencies in the Fixed-Satellite Service at the 109° W.L. Orbital Location*, Order and Authorization, File No. SAT-LOA-20031211-00350 (Int'l Bur. rel. Sept. 30, 2004), ¶ 19 ("*EchoStar 109° W.L. Authorization*").

<sup>24</sup> See *EchoStar 109° W.L. Authorization*, ¶¶ 10-13.

Thus, although EchoStar anticipates being able to put this spectrum to relatively productive use, it is far from a panacea in terms of relieving DBS spectrum constraints.

Respectfully submitted,



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